PP

v.

VELORY LIBONG

HIGH COURT SABAH & SARAWAK, KUCHING
LAU BEE LAN J
[CRIMINAL REVISION NO: 43-02-2005-II]
12 AUGUST 2005

CRIMINAL PROCEDURE: *Sentence - Juvenile offender - Juvenile offender pleaded guilty to charge of rape under s. 376 Penal Code - Sentenced to detention and whipping under s. 91(1)(f) and (g) Child Act 2001 respectively - Whether punishments under s. 91(1) could be combined - Whether paras. (a) to (h) of s. 91(1) must be read disjunctively - Child Act 2001, ss. 91(1), 93(1)*

STATUTORY INTERPRETATION: *Construction of statutes - Literal approach - Whether punishments under s. 91(1) Child Act 2001 could be combined - Whether paras. (a) to (h) of s. 91(1) must be read disjunctively - Child Act 2001, ss. 91(1), 93(1)*

The present matter was referred to the court for revision by the learned magistrate, who had ordered one Velory Libong ('the offender') to be sent to the Henry Gurney School for three years and to be whipped three times with a light rotan in the court premises, pursuant to s. 91(1)(f) and (g) of the Child Act 2001 ('the Act') respectively ('the order'). The offender, 14 years of age at the material time, had appeared before the learned magistrate in the Court For Children on a charge of rape under s. 376 of the Penal Code. The offender had pleaded guilty and the learned magistrate, upon the advice of two advisors and after due consideration of the facts of the case, made the order. The only issue requiring determination here was whether the learned magistrate had been correct in imposing the whipping in addition to the detention against the offender.

Held (setting aside order of whipping):

[1] If it is to be argued that the exercise of powers under paras. (a) to (h) of s. 91(1) of the Act can be meted out by a combination of any powers provided therein, the legislature would, in the opening words of s. 91(1) of the Act, have provided in clear terms to that effect by the use of suitable and precise language. However, this was not the situation in the present case as the usage of the semi-colon after each paragraph in s. 91(1) of the Act had the effect of showing that each paragraph was

independent of the other. Further, such an interpretation would be in tandem with the literal rule of construction whereby the court is to construe the provision of the statute ie, s. 91 of the Act based on the statutory provision itself, and the court must not read into the provision any matter which is not provided for by the legislature. (pp 802 h & 803 a-b)

[2] If it is intended by s. 91(1)(a) to (h) of the Act that a combination of punishments is possible, each of the punishments provided under paras. (a) to (h) of the Act should then be able to complement each other. However, as an illustration, the punishment of admonishing and discharging under para. (a) cannot complement the punishment under para. (b) of discharging the child on his execution of a bond of good behaviour subject to conditions, as it will result in an absurd order. In addition, the word "any" in the phrase, "The court for children shall, in addition to exercising any of the powers provided for in subsection 91(1) …" contained in s. 93(1) of the Act reinforces the point that paras. (a) to (h) of s. 91(1) of the Act is to be read disjunctively. Otherwise, if it is intended for a combination of any two of the punishments in s. 91(1) of the Act to be available to the presiding magistrate in the exercise of his discretion under s. 91(1) of the Act, it is envisaged that apart from the word "any" appearing in the phrase "any of the powers provided for in subsection 91(1)", the words "or with any two of such punishments" would have been also used. (pp 803 c & 804 d-e)

[3] Therefore, the order of the learned magistrate was erroneous and ought to be varied by setting aside the order for the whipping of the offender. (p 804 f)

Case(s) referred to:
Malaysian Vermicelli Manufacturers (Melaka) Sdn Bhd v. PP [2001] 7 CLJ 74 HC
Muhammed Hassan v. PP [1998] 2 CLJ 170 FC
PP v. Tan Tatt Eek & Ors Appeals [2005] 1 CLJ 713 CA
Re A Juvenile [1990] 3 MLJ 117
Yeong Peng Wah v. Bahal Singh [1961] 27 MLJ 316

Legislation referred to:
Child Act 2001, ss. 91(1)(f), (g), 93(1), 105
Criminal Procedure Code, ss. 316, 325
Dangerous Drugs Act 1952, s. 37(da)
Juvenile Courts Act 1947, s. 12(1)
Penal Code, ss. 354, 376

For the public prosecutor - Yong Leou Shin DPP
Respondent in person

Reported by Suresh Nathan

JUDGMENT

Lau Bee Lan J:

Background

This matter was referred to the court for revision by the learned Magistrate of Magistrate Court 'E' *vide* an undated letter. In the said letter he stated that the offender, Velory ak Libong, had appeared before him in the court for children on 16 February 2005 on a charge of rape under s. 376 of the Penal Code. The offender had pleaded guilty and upon the advice of two advisors and after due consideration of the facts of the case he ordered the offender to be sent to Henry Gurney School for three (3) years and in addition the offender was to be whipped three (3) times with a light rotan in the court premises and in the execution of the whipping he made the order that if the parents decide to be present, they could do so (hereinafter referred to as "the order"). The learned Magistrate also stated that it was brought to his attention by a probation officer it was the first time in Malaysia under the Child Act 2001 (Act 211) ("the Act") that the court for children imposed whipping in addition to an order for detention in an approved school ie, Henry Gurney School. The learned Magistrate had submitted the matter to the High Court for direction as to the propriety of the said order made therein.

The learned DPP Yong Leou Shin as the applicant in respect of this criminal revision submitted that the learned Magistrate was correct in making the order as he was empowered to do so pursuant to s. 75(1) and s. 91(1)(g) of the Act. She informed the court that there is a dearth of material in respect of this matter. She referred the court to the authority of *Re A Juvenile* [1990] 3 MLJ 117 s. 12(1) of the Juvenile Courts Act 1947 (Act 90), notes of proceedings in the Magistrate's Court Alor Star Juvenile Case No. 84-1549-2002 and the High Court Alor Star Criminal Application No. 44-05-2003 pertaining to the revision of the Juvenile Case No. 84-1549-2002 and the High Court Case of *Malaysian Vermicelli Manufacturers (Melaka) Sdn Bhd v. PP* [2001] 7 CLJ 74.

Findings And Evaluation

Although the learned Magistrate in this instant case did not cite the section under the Act in respect of the order that he made on 16 February 2005 against the offender who was fourteen (14) years two (2) months and sixteen (16) days (birth date 30 November 1990) based on the Probation Report dated 14 February 2005, the relevant sections which the learned Magistrate had invoked to my mind are s. 91(1)(f) and s. 91(1)(g) of the Act (order to be sent to Henry Gurney School and order of whipping) respectfully.

For the purpose of determining this issue, the whole of s. 91(1) of the Act is reproduced as follows:

> 91. (1) If a Court For Children is satisfied that an offence has been proved the Court shall, in addition to any other powers exercisable by virtue of this Act, have power to:
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> (a) admonish and discharge the child;
>
> (b) discharge the child upon his executing a bond to be of good behaviour and to comply with such conditions as may be imposed by the Court;
>
> (c) order the child to be placed in the care of a relative or other fit and proper person:
>
> (i) for such period to be specified by the Court; and
>
> (ii) with such conditions as may be imposed by the Court;
>
> (d) order the child to pay a fine, compensation or costs;
>
> (e) make a probation order under section 98;
>
> (f) order the child to be sent to an approved school or a Henry Gurney School;
>
> (g) order the child, if a male, to be whipped with not more than ten strokes of a light cane:
>
> (i) within the Court premises; and
>
> (ii) in the presence, if he desires to be present, of the parent or guardian of the child;
>
> (h) impose on the child, if he is aged fourteen years and above and the offence is punishable with imprisonment and subject to subsection 96(2), any term of imprisonment which could be awarded by a Sessions Court.

Section 91 is a section empowering the Magistrate presiding in the court for children upon being satisfied that an offence has been proved is empowered to impose the punishment contained in paras. (a) to (h) of s. 91(1) of the Act. The question in this instant case is whether the learned Magistrate was correct in imposing the order under paras. (f) and (g) of s. 91(1) of the Act at the same time or in other words a combination of the two punishments.

From the notes of proceedings obtained by the learned DPP regarding Magistrate's Court Alor Star Juvenile Case No. 84-1549-2002, the court noted that the Magistrate had imposed whipping of three (3) light strokes and had ordered the offender to be sent to Henry Gurney School for three years under

s. 91(1)(g) and s. 91(1)(f) of the Act respectively. Upon revision *vide* High Court Alor Star Criminal Application No. 44-05-2003, the judge had ordered the whipping of three strokes imposed by the Magistrate on the offender to be set aside. No reasons were given.

In the Federal Court case of *PP v. Tan Tatt Eek & Ors Appeals* [2005] 1 CLJ 713, His Lordship Ahmad Fairuz CJ in dealing with the issue of whether the presumption of trafficking under s. 37(da) of the Dangerous Drugs Act 1952 could arise out of a presumption of possession under s. 37(d) and "the rule against double presumption" in the Federal Court case of *Muhammed bin Hassan v. PP* [1998] 2 CLJ 170 at p. 733(b) to (h) and p. 734(a) to (b) opined:

> Meneliti penghakiman mahkamah ini di dalam kes *Muhammed Hassan*, jelas kepada saya bahawa kaedah pentafsiran yang dipakai ialah kaedah literal. Ini dapat dilihat daripada penghakiman kes tersebut di ms 190 yang berbunyi:
>
> > Since the literal meanings of the two subsections are intelligible, they must not be extended on the ground that there has been a slip or a matter not provided for which should have been provided for. Any ambiguity or slip would be a matter for the legislature.
>
> Pada pendapat saya pendekatan mahkamah ini di dalam memakai kaedah pentafsiran literal itu adalah tepat. Di dalam kes *Megat Najmuddin bin Dato' Seri (Dr) Megat Khas v. Bank Bumiputra (M) Bhd* [2002] 1 CLJ 645 di ms 420 saya telah menyatakan persetujuan saya dengan keputusan Mahkamah Agung di India di dalam kes *Hiralal Ratan Lai v. The Sales Tax Officer, section III, Kampur* AIR [1973] SC 1034 di mana dinyatakan:
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> > In construing a statutory provision, the first and foremost rule of construction is the literary construction. All that we have to see at the very outset is what does that provision say? If the provision is unambiguous and if from that provision the legislative intent is clear, we need not call into aid the other rules of construction of statutes. The other rules of construction of statutes are called into aid only when the legislative intent is not clear.
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> Di dalam kes *Chin Choy & Ors. v. Collector of Stamp Duties* [1979] 1 MLJ 69, mahkamah ini menyatakan di ms 70:
>
> > It may be apposite at this stage to recall certain basic principles in the interpretation of statutes. Applying the words and phrases of a statute in the ordinary meaning has been said to be the first and most elementary rule of construction and the second is said to be construe the phrases and sentences according to the rules of grammar.

Willan CJ di dalam kes *Yeo Peck Chie v. KS Gill & Co* [1946] MLJ 131 di ms 133 pula menyatakan:

> In interpreting a provision of a statute, one of the cardinal rules is to adhere as closely as possible to the literal meaning of the words. If an authority is required for this, it is to be found in the case of *Abbott v. Middleton* [1858] 7 HL Cas 114. Once the literal meaning has been established then, however unjust, arbitrary or inconvenient such meaning may be, it must receive its full effect – see *Biffin v. Yorke* 5 Man & G 428. Nor is it the function of the court to scan the wisdom or policy of a statute – see *May v. The Great Western Railway Co* 41 LJ QB 104.

Basically from the aforesaid case, the legal principle to be adhered to in the interpretation of statute is that the first and foremost rule of construction is the literal rule of construction in that if the provision is unambiguous and if in that provision the legislative intent is clear there is no need to resort to other rules of construction of statutes and the court should not usurp the function of the legislature.

It is to be noted from the above provision of s. 91 that after every paragraph from (a) to (g) each paragraph ends with a semi-colon except with para. (h) which ends with a full stop. With respect to the status of the punctuation mark of semi-colon, Thornton – Legislative Drafting 1970 states:

> The most important thing to remember about the semi-colon is that it is the mark of co-ordination. Its function to show a relationship between elements of a sentence, usually clauses, which a complete break into a separate sentence would tend to obscure.
>
> In legislation the semi-colon is useful for 2 principal tasks:
>
> (a) To co-ordinate within a section or sub-section **2 independent clauses** having a relationship close enough to render it desirable that the clauses be joined in one sentence yet remote enough to mark the co-ordination by a semi-colon rather than by means of a conjunction with or without a common.
>
> (b) To co-ordinate a series of paragraphs or sub-paragraphs.

If it is to be argued that the exercise of powers under paras (a) to (h) of s. 91(1) of the Act can be meted out by a combination of any of the powers provided therein, it is my view that the legislature would in the opening words of s. 91(1) of the Act provide in clear terms to that effect by the use of language like "have power to impose any two of such punishments". To illustrate, I refer to s. 354 of the Penal Code where in respect of the offence of assault of use of criminal force to a person to outrage modesty, the punishment is imprisonment for a term which may extend to ten years or with

fine, or with whipping, or with any two of such punishments. However, this is not the situation in the present case as the usage of the semi-colon after each paragraph in s. 91(1) of the Act would have the effect of showing that each paragraph is independent of the other (see the excerpt in *Thornton (supra)*). Further, such an interpretation would be in tandem with the literal rule of construction whereby the court is to construe the provision of the statute ie, s. 91 of the Act based on the statutory provision itself and the court must not read into the provision any matter which is not provided for by the legislature.

In addition, it is my view that if it is intended by s. 91(1)(a) to (h) of the Act that a combination of punishments is possible, then each of the punishments provided under paras. (a) to (h) of the Act should be able to complement each other. However, as an illustration, the punishment of admonish and discharge under para. (a) cannot complement the punishment under para. (b) of discharging the child on his execution of a bond of good behaviour subject to conditions as it will result in an absurd order.

I draw support for the view above from the judgment of Ong J in the case of *Yeong Peng Wah v. Bahal Singh* [1961] 27 MLJ 316 which was referred to in the case of *Malaysian Vermicelli Manufacturers (Melaka) Sdn Bhd (supra)* and with whom I agree. In the former case, Ong J at p. 317 para. G-I left-hand column stated, "it is a cardinal rule of construction that in construing any particular clause in a statute one has to look to its connection with other clauses in the same statute, and the conclusions which, on comparison with other clauses, many (*sic* – may) reasonably and obviously be drawn. If comparison of one clause with others in the statute makes a certain proposition clear and undoubted, the Act must be construed so as to make it a consistent and harmonious whole. If after all it turns out that that cannot be done, the construction that produces the greatest harmony and the least inconsistency is that which ought to prevail. (See *Attorney-General v. Sillom*).

It is also to be noted that apart from being able to exercise the powers contained in paras. (a) to (h) of s. 91(1) of the Act, the presiding Magistrate of a court for children upon being satisfied that an offence has been proved, **can in addition exercise any other powers provided under the Act.** To illustrate this point, I refer to s. 91(1)(c) of the Act which provides the Magistrate can order the child to be placed in the care of a relative or other fit and proper person for a period to be specified by the court and subject to conditions imposed by the court. In addition to this exercise of power under s. 91(1)(c), the Magistrate can exercise the power under s. 105 of the Act wherein he can vary or revoke the order upon an application made by the

parent or guardian of the child, the protector or the probation officer as the case may be. (see s. 101(1), (2) and (3)). This is clearly borne by the language of s. 105(1) of the Act which states "This section shall apply in relation to an order made under this Act placing a child in the care of a fit and proper person".

Another example would be, if a Magistrate is to make an order under s. 91(1)(b) of the Act by discharging the child upon his execution of good behaviour subject to conditions imposed by the court, the Magistrate can in addition, under s. 93(1) of the Act, stipulate the conditions contained therein. This additional exercise of power is expressly provided in s. 93(1) of the Act which states "The court for children **shall, in addition to exercising any of the powers provided for in subsection 91(1),** order the parent or guardian of the child to execute a bond for the child's good behaviour with or without security and with one or more of the following conditions: ((a) to (e).) (emphasis added).

In my judgment, the word "any" in the phrase "The court for children shall, in addition to exercising any of the powers provided for in subsection 91(1)" contained in s. 93(1) of the Act referred to above reinforces the point that paras (a) to (h) of s. 91(1) of the Act is to be read disjunctively. Otherwise in my view if it is intended for a combination of any two of the punishments in s. 91(1) of the Act to be available to the presiding Magistrate in the exercise of his discretion under s. 91(1) of the Act, it is envisaged that apart from the word "any" appearing in the phrase "any of the powers provided for in subsection 91(1)", the words "or with any two of such punishments" would have been used also.

For the aforesaid reasons, I am of the view that the order of the learned Magistrate is erroneous and in the exercise of my power under s. 325 read with s. 316 of the CPC, I vary the order of the learned Magistrate by setting aside the order of whipping of three (3) strokes and consequentially the order that in the execution of whipping if the parents of the child decide to be present they may do so. Order accordingly.